Law Note

SUMMARY CREDITOR REMEDIES: GOING . . . GOING . . . GONE?

> "For instance, now, (the Queen states to Alice) . . . there's the King's Messenger. He's in prison now, being punished; and the trial doesn't even begin til next Wednesday; and of course the crime comes last of all." Alice replies: "Suppose he never commits the crime?" "That would be all the better, wouldn't it?" the Queen responds.[1]

Traditionally, the concept of "fair play and substantial justice" has been proclaimed the hallmark of procedural due process.[2] Elementary to such a concept is the basic postulate that one with an interest to protect be given notice of any claims against that interest and an opportunity to be heard in the matter.[3] A logical inference one may draw from all of this is that to be truly effective, "notice and hearing" would best serve the tenets of due process when they occur prior to one's being deprived of his property, and not after the deprivation has occurred. Surprisingly, such has not traditionally been the case for a class of the general public most commonly referred to as "debtors."[4] As to this class of persons, the time and nature of notice and hearings have been allowed to fluc-

1. L. CARROLL, THROUGH THE LOOKING GLASS, (Modern Library Edition) 226-227 (1872).
2. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).
3. *Id.*
4. Comment, *The Constitutional Validity of Attachment In Light of Sniadach v. Family Finance Corp.*, 17 U.C.L.A.L. REV. 837 (1970).

tuate from judicial hearings prior to seizure to administrative hearings sometime after seizure.[5] The reason for this state of affairs appears to be the existence of the statutory device of the prejudgment remedy.

Prejudgment remedies are summary in nature. They are executed with rapidity and performed without ceremony or formality. By their very nature, opportunity to assert defenses comes after, not before the fact.

For some 600 years, the summary creditor remedy has been firmly implanted in both the common law and statutes.[6] Yet since 1969 summary remedy statutes throughout the nation have come under the careful scrutiny of the courts. The result appears to be an unprecedented number of overturned statutes which have not met the "prior notice and hearing test." California alone has seen the courts strike down prejudgment statutes concerning garnishment,[7] attachment,[8] unlawful detainer,[9] claim and delivery,[10] and the repossession and disposition of collateral.[11]

This article will focus upon the documentation of the major decisions in this area of the law within the past three years. It is hoped that this article will set these decisions in an historic perspective, examine the most recent cases and their implications, and predict the outcome of those cases and issues not yet resolved. Although the concern of the documentary will be with the national trend, close attention will be given to the developments in California law and possible changes in summary creditor remedies currently underway in the California legislature.

LANDMARK: SNIADACH, JUNE 9, 1969—AN ASSAULT ON HISTORY

On June 9, 1969, the United States Supreme Court held that Wis-

5. *Id.*
6. *See* 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 282-285 (1927) and 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 557 (1909).
7. McCallop v. Carberry, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).
8. Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).
9. Mihans v. Municipal Court, 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1970).
10. Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).
11. Adams v. Egley's Recovery Service, 338 F. Supp. 614 (S.D. Cal. 1972).

consin's prejudgment wage garnishment procedure violated the fundamental principles of due process since it authorized the seizure of wages without prior notice or an opportunity for a hearing.[12] The Wisconsin statute involved[13] had provided that the clerk of court issue a summons at the request of a creditor's lawyer. By serving the employer-garnishee, the lawyer could secure the "freezing" of one half of the wages due an employee-debtor. Subsequent to this action, the creditor had ten days in which to also serve the summons and complaint upon the debtor himself. The wages could be unfrozen when and if the debtor challenged the garnishment in court and won on the merits.

In the relatively short majority opinion of five pages, the primary question considered was whether there had been a taking of property without due process. Justice Douglas, author of the opinion, appears to have focused upon the issue within a socio-economic context; emphasizing the type of debt and property involved. After noting that "because a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms,"[14] the court went on to deal specifically with wages—noting the grave hardships and economic leverage a creditor could exercise over a wage earner.[15] By recognizing the significant advantage our economic system allows a creditor, the court drew what appears to have been a sharp distinction between legal philosophy and economic reality.[16]

In his concurring opinion, Justice Harlan carried the majority opinion one step further by applying a stricter due process formula.[17] He rested his decision on what he termed the Anglo-American theory that property should not be taken prior to a hearing—even if the property might later be returned. After all, it was the "use" of the property which had been seized.

Although *Sniadach's* language was couched in terms of the "special quality of wages," hardly had its ink dried before the battle began over whether its rationale and principles should be applied to a variety of statutory prejudgment replevin cases already before the courts of several states.

A Question of Intent: The Narrow View

It has been pointed out that the *Sniadach* court's "favorable" ci-

12. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).
13. R.S. 1858, c. 130, § 53 (1858), *as amended* Wis. Stat. § 367.18 (1969).
14. Sniadach v. Family Finance Corp., 395 U.S., at 340 (1969).
15. *Id.* at 341.
16. *Id.* at 339.
17. *Id.* at 342 (concurring opinion).

tation to the 1928 *McInnes* decision[18] contains a forceful rejection of the view that attaching property constitutes an unconstitutional deprivation of property interests.[19] The Supreme Court in *McInnes* merely affirmed per curiam a Maine decision[20] which saw that state's highest court uphold Maine's attachment procedure. The Maine statutes had been challenged on the ground that the creditor need not post a bond prior to the attachment. One might note, though, that unlike *McInnes*, the *Sniadach* challenge was put specifically to the issue of receiving prior notice and hearing. The value of attachment itself was not the crux of the *Sniadach* case, as it was in *McInnes*. Thus *Sniadach* challenged the procedural due process while *McInnes* challenged the substantive due process of attachment itself.[21] Although the latter might be satisfied by a given remedy, the former may not be.

Some eight months after the *Sniadach* decision, on March 20, 1970, one of the first chances to interpret that case arose in *Brunswick Corporation v. J and P, Inc.*[22] which involved the repossession and resale of bowling equipment. The repossession had occurred pursuant to the terms of a conditional sales contract, and in conformance with the Oklahoma Uniform Commercial Code.[23]

In its decision, the *Brunswick* court gave no merit to the tenets enunciated in *Sniadach*, distinguishing that case on the basis that it was a "unique case involving 'a specialized type of property presenting distinct problems in our economic system.' "[24] *Brunswick*, reasoned the court, involved not wages, but a security interest.

Clarification and a Broader View

Three days after *Brunswick* was decided, the U.S. Supreme Court in *Goldberg v. Kelly*[25] considered the question of cutting off welfare aid prior to a hearing. Appellees in that case, residents of

18. McKay v. McInnes, 279 U.S. 820 (1928); cited at 395 U.S. 340.
19. Comment, *Laprease and Fuentes: Replevin Reconsidered,* 71 COLUM. L. REV. 886, 897 (1971).
20. McKay v. McInnes, 127 Me. 110, 141 A. 699 (1928), *aff'd*, 279 U.S. 820 (1928).
21. Sniadach v. Family Finance Corp., 395 U.S., at 340 (1969).
22. Brunswick Corporation v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970).
23. 12 A. O.S. 1961, §§ 1-101 *et seq.*, 9-207(3), 9-504(3), 9-507, 9-507(1).
24. Brunswick Corp. v. J & P Inc., 424 F.2d at 105 (10th Cir. 1970).
25. 397 U.S. 254 (1970).

New York, had been receiving federally financed aid to families with dependent children. When the aid was terminated without a prior hearing, the former recipients challenged the procedure as having denied them due process as guaranteed by the fourteenth amendment.[26]

The formula applied by the *Goldberg* Court was a test of balancing the extent to which due process varies in application—depending upon whether the individual's interest in avoiding loss is outweighed by the interest of the government in a summary adjudication.[27] Once again in a concurring opinion[28] Justice Harlan was to stress the fundamental requisite of due process as the opportunity to be heard. This opportunity, he reasoned, must be tailored to the capacities and circumstances of those who are to be heard.[29] Written submissions would not be satisfactory[30]—the recipient of aid must be allowed to state his position orally.

Four months later, in *Laprease v. Raymour's Furniture Co.*,[31] another New York welfare recipient asked a three-judge federal district court to declare unconstitutional Article 71 of the New York Civil Practice Law and Rules. That article had authorized repossession of articles purchased under conditional sales contracts when a purchaser defaulted in payments.[32] Mrs. Laprease had purchased a bed, mattress, a high chair, and other household

26. The local law of the City of New York had provided at least a 7-day prior notice to a recipient whose welfare funds were to be cut. The recipient could then ask for a review of the proposed cut by a superior of the supervisor who approved the discontinuance. The recipient could then submit a written statement as to why payments should not be discontinued. *See* Subdivision (b) of § 351.26 of New York Regulations as amended.

27. Goldberg v. Kelly, 397 U.S., at 263 (1970).

28. *Id.* at 267.

29. *Id.* at 269.

30. *Id.*

31. 315 F. Supp. 716 (N.D.N.Y. 1970).

32. In New York, the replevin of a chattel could be effected only as part of a larger action to try the right to possession of the chattel. The main suit was to be commenced before or at the time the plaintiff delivered an affidavit or undertaking to the sheriff. In his affidavit the plaintiff had to establish the identity and value of the property since he had to post twice its value. The sheriff was then authorized to seize the chattel without delay and keep it for three days before delivering it to the creditor-plaintiff—unless the defendant reclaimed the chattel by posting a reclaiming bond equal to that posted by the plaintiff. If the defendant did post the bond, the sheriff once again held the property for three days, after which time the defendant-debtor would regain possession and the main action would proceed to a final judgment. N.Y. Civ. Prac. § 7101-7108 (McKinney 1963); *See also* Comment, *Professional Remedies In New York Reappraised Under Sniadach v. Family Finance Corp.: A Constitutional Fly In The Creditor's Ointment*, 34 Albany L. Rev. 426, 447 n.147 (1970).

goods from Raymour's Furniture Company under a conditional sales contract. Due to an illness and subsequent loss of salary, Mrs. Laprease could not continue her payments.[33] Fearing that the goods might be repossessed, she brought suit to stay seizure pending a court hearing on the matter.

Mrs. Laprease offered three bases of challenge to the New York laws: due process denial, fourth amendment and denial of equal protection.[34] Only the former two were considered by the court, which concluded that

> the lack of refrigeration, cooking facilities and beds create hardships, it would seem, equally as severe as the temporary withholding of half of Sniadach's pay.[35]

Hence, it was held that procedural due process requires that notice and hearing occur before an alleged debtor's property is seized. As such, Article 71 of the New York CPLR was found deficient.[36]

One might note that the *Laprease* court utilized two rationales to support its decision. First, it applied the balancing test of *Goldberg*,[37] where it found that the government interest in summary repossession did not outweigh that of Mrs. Laprease. Secondly, the *Laprease* court avoided having to come to grips with an interpretation of just what scope *Sniadach's* "specialized type of property" concept of wages should be given. This was quite simply accomplished by categorizing Mrs. Laprease's furniture as "specialized property."[38] Although this puddle-jumping did accomplish its immediate goal, it introduced a problem for future adjudication: exactly what type of goods should be considered "specialized types of property," and thus protected property?[39]

After applying the tenets of due process' opportunity to be heard to both wage garnishment and welfare, the next significant application of the pronounced doctrines by the U.S. Supreme Court appears to have been in the area of access to the courts. As articu-

33. 71 COLUM. L. REV. 886, *supra* note 19, at 890; *See also* text and comments accompanying no.22 *supra*.
34. Bases of consumer actions are discussed at p. 303 *infra*.
35. 315 F. Supp. at 723.
36. *Id.* at 724.
37. *See* text accompanying notes 25-27 *supra*.
38. 315 F. Supp. at 722.
39. This specific problem will be discussed more fully at p. 316 *infra*.

lated by the Court in *Boddie v. Connecticut*,[40] due process requires that an individual be given an opportunity for a hearing *before* he is deprived of *any* significant property interst.[41]

By 1971, it is clear that a growing trend was developing as an outgrowth of the 1969 *Sniadach* decision. It was a trend toward reading *Sniadach's* language broadly enough to encompass prejudgment replevin statutes. Although the U.S. Supreme Court had not yet specifically considered the validity of the summary creditor remedies, the beginning of such a battle was already underway in the lower federal and state courts.

CALIFORNIA DEVELOPMENTS

Although California's prejudgment wage garnishment statutes were declared unconstitutional in 1970,[42] it was during the summer months of 1971 that the California Supreme Court launched a concerted judicial attack on summary creditor remedies. California's claim and delivery statutes[43] were challenged in *Blair v. Pitchess*,[44] and its prejudgment attachment procedures[45] were challenged in *Randone v. Appellate Department*.[46] In both cases, the statutory provisions were declared unconstitutional violations of the tenets of procedural due process.

Claim and Delivery Attacked

Prior to the *Blair* decision, the California statutes had provided that at the time a summons was issued or before the answer in an action to recover possession of personal property, a plaintiff could require the local sheriff to seize the property from the defendant.[47] This procedure was initiated when the plaintiff filed an affidavit together with an undertaking of at least two sureties for

40. Boddie v. Connecticut, 401 U.S. 371 (1971); The statutes involved can be found at CONN. GEN. STAT. REV. §§ 252-261 (1968). These statutes provided that in order to file for a divorce, the clerk of court must be paid $45. They were challenged as violating due process since the inability to pay may prevent access to the courts to indigents who in good faith have sought a judicial dissolution of their marriage.
41. 401 U.S. at 378.
42. McCallop v. Carberry, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).
43. CAL. CODE CIV. PRO. §§ 509-521 (West 1954).
44. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42.
45. CAL. CODE CIV. PRO. § 537.1 (West 1954).
46. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709.
47. CAL. CODE CIV. PRO. §§ 509, 511 (West 1954); *See also* Ordin, *Summary Creditor Remedies: A Thing of the Past?*, 47 L.A. BAR BULL. at 230 (1972).

twice the value of the property.[48] The sheriff was thereby authorized to take the property, even if the taking had to be forceful,[49] and to accomplish this, he could "call to his aid the power of his county."[50]

California's claim and delivery statutes, which were established in 1851,[51] were attacked by the *Blair* court on three separate grounds[52]—that they violated (1) the fourth and fourteenth amendment provisions against unlawful searches and seizures (2) the due process requirements of the fifth and fourteenth amendments, and that they also violated the corresponding California Constitution provisions.[53]

In order to hold that Civil Code § 517 constituted unreasonable searches and seizures in the absence of probable cause, the court had first to hurdle the problem of applying a criminal law concept to a civil action. To do this, the court relied on *Camara v. Municipal Court*[54] and *See v. City of Seattle*.[55] In both of these decisions, the U.S. Supreme Court had held that the fourth amendment protections are not to be limited solely to criminal cases.

The second problem facing the court was the concept of waiver. The defendant-creditor in *Blair* had argued that Blair had personally and contractually consented to the search and resulting seizure by waiving his fourth amendment rights. Once again borrowing principles firmly established in the criminal field, the court held that an acquiescence to a claim of legal authority is not a voluntary waiver—the acquiescence occurring after the officer had identified himself and had shown and explained the meaning of the claim and delivery process to those present.[56] Thus,

> In claim and delivery cases the occupant of the premises is confronted not only by the intimidating presence of an officer of the law, but also by the existence of legal process which appears to justify the intrusion. In such a situation acquiescence to the intru-

48. CAL. CODE CIV. PRO. §§ 510, 512 (West 1954).
49. CAL. CODE CIV. PRO. § 517 (West 1954). This section permitted the sheriff, after demanding delivery, to cause the building "to be broken open."
50. *Id.*
51. Stats. 1851, c.5, p.65, § 100.
52. 5 Cal. 3d at 285, 486 P.2d at 1261, 96 Cal. Rptr. at 61.
53. CAL. CONST. art. I, §§ 13 and 19.
54. 387 U.S. 523 (1967).
55. 387 U.S. 541 (1967).
56. 5 Cal. 3d at 274, 486 P.2d at 1253, 96 Cal. Rptr. at 53.

sion cannot operate as a voluntary waiver of Fourth Amendment rights.[57]

The court found that contractual provisions purporting to give the seller the right to retake the property on default of payment are, in essence, provisions of adhesion contracts, the terms of which are dictated by the seller.[58] Further, the court reasoned that even if the consent had been valid, it was consent personal to the seller, and could not be assigned to an officer of the law.[59]

In the area of due process, the *Blair* court relied heavily on *Sniadach*[60] to establish that California's claim and delivery procedures violated the fifth and fourteenth amendments. The principles enunciated in *Sniadach* had been violated, since there was a taking, the taking had occurred prior to a hearing and in the absence of weighty state or creditor interests. Further, the California statutory scheme was not drawn narrowly enough to encompass only extraordinary circumstances.[61] With this, the California court was making it very clear that it would give *Sniadach* a broad view.[62]

Besides the *Sniadach* decision, the *Blair* court was also guided by the *Boddie*[63] case and its articulation of the requisites of due process.[64]

Although the *Blair* court could find no way through which the claim and delivery law could be saved by judicial interpretation, the court expressed the hope that the legislature might enact new prejudgment replevin remedies "in conformity with the constitutional principles discussed (in the *Blair* case)."[65]

Prejudgment Attachment: A Corollary And Beyond

With *Randone*[66] came the decision that California's attachment provisions pursuant to Code of Civil Procedure § 537 violated due process requirements. Subsequent to the *Sniadach* decision, the court had held it unconstitutional to attach wages in California

57. *Id.* at 275, 486 P.2d at 1254, 96 Cal. Rptr. at 54 (1971).
58. *Id.*
59. *Id.*
60. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).
61. Blair v. Pitchess, 5 Cal. 3d at 277, 486 P.2d at 1255, 96 Cal. Rptr. at 55 (1971).
62. *Id.*
63. *See* discussion accompanying n.40 *supra.*
64. Blair v. Pitchess, 5 Cal. 3d at n.10, 486 P.2d at n.10, 96 Cal. Rptr. at n.10.
65. 5 Cal. 3d at 284, 486 P.2d at 1260, 96 Cal. Rptr. at 60.
66. Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

under Section 537.1 of the Code of Civil Procedure.[67] But the court had declined to pass on the constitutionality of Section 537 in its entirety,[68] choosing instead to await a case involving a creditor-debtor relationship. *Randone* afforded the opportunity. There, the court had before it a debtor whose creditor had attached property other than wages.

The *Randone* court rejected the creditor argument that *Sniadach* be limited to prejudgment wage garnishment, emphasizing that *Sniadach* could not be so limited since it was not simply a new rule being applied to wage garnishments, but was rather an expression of "the mainstream of the past procedural due process decisions of the United States Supreme Court."[69]

Although *Randone* relied upon *Sniadach*, *Boddie* and its recent ruling in *Blair*, the strength and weakness of the decision rested with its reliance upon the balancing test expressed in the *Goldberg* case. The test was based on the analysis that the extent to which due process must be afforded will vary with the individual's interest in avoiding grievous loss balanced against the urgency of governmental interest in a summary adjudication. The *Randone* court held that the hardships imposed on a debtor by the attachment of his "necessities of life"[70] is so severe that it is never sufficient to allow such a deprivation before notice and hearing on the actual validity of a creditor's claim.[71]

The strength of *Randone* rests in the fact that it extended the effect of the procedural due process requirements of *Blair* by requiring a hearing on the validity of the claim.[72]

Randone's weakness lies, ironically, in its strength. For although it excluded all "necessities" from prejudgment seizure, it did not define what procedure should be used in determining exemption. Although *Randone* defined "necessities" as those items

67. McCallop v. Carberry, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970). *See also* Cline v. Credit Bureau of Santa Clara County, 1 Cal. 3d 908 (1970).
68. People *ex rel.* Lynch v. Superior Court, 1 Cal. 3d 910, 464 P.2d 126, 83 Cal. Rptr. 670 (1970).
69. 5 Cal. 3d at 550, 488 P.2d at 22, 96 Cal. Rptr. at 718.
70. The "necessity" in *Randone* was a checking account which had been attached.
71. 5 Cal. 3d at 558, 488 P.2d at 27, 96 Cal. Rptr. at 723.
72. *Id.* at 558, 488 P.2d at 28, 96 Cal. Rptr. at 724.

which are "essential for day-to-day living" and "which would impose tremendous hardships" and force a debtor to settle a claim without judicial recourse and thus deprive the debtor of a "meaningful opportunity to be heard on the merits,"[73] the court did not evaluate whether the existing exemption provisions were adequate to define "necessities."[74]

Although the court had deferred to the legislature in coming up with an acceptable attachment method within its judicial principles,[75] the California courts handed their legislature and future state courts the overwhelming problems of legislative delegation and possibly widely divergent definitions of "necessities."

REMAINING EXCEPTIONS

It might be best at this point to note that beginning with the *Sniadach* decision, the trend has left exceptions to the rule that summary creditor actions without notice or hearing deny procedural due process. But it is clear that to withstand the test of constitutionality, statutes implementing these exceptions must be narrowly drawn to include only "extraordinary circumstances."[76] Further, such summary deprivations appear to have several factors in common. First, the seizures seem to benefit the public rather than a private individual; second, the nature of the risk involved requires immediate action; and third, the property taken does not vitally affect another's livelihood. Thus the *Sniadach* court sanctioned the prejudgment remedy permitting specialized government officers to react immediately to serious financial difficulties of a banking institution by seizing operational control of the bank's assets,[77] and permitting the immediate seizure of misbranded drugs on the market.[78]

One other case cited by *Sniadach*, *Ownbey v. Morgan*,[79] found

73. *Id.* at 561, 448 P.2d at 30, 96 Cal. Rptr. at 726.

74. The provisions of CAL. CODE CIV. PRO. §§ 620 *et seq.* encompass a wide variety of items ranging from "necessary household furnishings" to a church pew.

75. The *Randone* court pointed out that "a constitutionally valid prejudgment statute, which exempts necessities from its operation, can be drafted by the legislature" to permit attachment of property after notice and hearing. *See* Randone v. Appellate Dep't., 5 Cal. 3d at 563, 448 P.2d at 31, 96 Cal. Rptr. at 727 (1971).

76. Sniadach v. Family Finance Corp., 395 U.S. 339 (1969). *See also* discussion in Randone v. Appellate Dep't., 5 Cal. 3d at 553, 488 P.2d at 24, 96 Cal. Rptr. at 720 (1971).

77. Fahey v. Mallonee, 332 U.S. 245 (1947); Coffin Brothers v. Bennett, 277 U.S. 29 (1928).

78. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).

79. 256 U.S. 94 (1921).

constitutional a statute permitting prejudgment attachment of a nonresident's property by a resident creditor. Although the "public interest" in *Ownbey* was not as strong as those cases thus considered, the quasi-in-rem attachment of *Ownbey*, in conformance with the prevailing theories of jurisdictional authority, was frequently the only basis by which a state could afford its own citizens an effective remedy for injuries inflicted by nonresidents.[80]

BASES UPON WHICH PLAINTIFF-DEBTOR ARGUMENTS HAVE RESTED

Due Process

> Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment . . . procedure violates the fundamental principles of due process.[81]

Applying the procedural requirements of due process, i.e. notice and an opportunity to be heard *prior* to a taking of property, due process was an argument readily available to the courts following *Sniadach*. It was applied in *Laprease* where the court announced that procedural due process requires that notice and hearing be provided prior to seizing a debtor's property, or at least that the creditor present to a judicial officer the circumstances allegedly justifying summary action.[82] One might also note that the due process argument appears to have served at least a partial basis in all of those cases considered thus far.[83] The reasons may be two-fold. First, Due Process was firmly established as an accepted basis of challenge to summary remedies with the *Sniadach* decision. Secondly, the procedural due process argument is itself not a complicated one to apply—the two requirements being prior notice and hearing.

The Fourth Amendment

The taking of goods by an officer of the law appears to fall within the borderline between the region of governmental searches

80. Randone v. Appellate Dep't., 5 Cal. 3d at 554, 488 P.2d at 25, 96 Cal. Rptr. at 721.
81. Sniadach v. Family Finance Corp., 395 U.S. 342 (1969) (footnote omitted).
82. 315 F. Supp. 724.
83. Boddie v. Connecticut, 401 U.S. 371 (1971); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

and seizures, and the constitutionally regulated area of private searches and seizures.[84] More specifically, a summary action involves a warrantless search and seizure by an officer of the law at the request of a private party, for use in a private action.[85]

Even prior to the *Blair* decision,[86] which utilized a fourth amendment basis, the *Laprease* court had grappled with the problem of applying what had traditionally been a criminal law concept to a civil action. By applying the expanding doctrines of *Camara* and *See*,[87] the *Laprease* court had found that

> If the Sheriff cannot invade the privacy of a home without a warrant when the state interest is to prevent a crime, he should not be able to do so to retrieve a stove or refrigerator about which the right to possession is disputed.[88]

The problems in applying the fourth amendment base rest with the fact that most summary remedies are statutory remedies. Had the summary remedies, such as replevin, remained common law remedies, the problem might have been easier[89] for at common law, an officer of the law might not enter a building without the consent of the owner for the purpose of serving a civil suit or process.[90] However, most states with summary remedy statutes similar to replevin either expressly or by statutory interpretation have conferred upon the sheriff the authority to make a forceful entry.[91]

Those courts which have refused to accept a fourth amendment base appear to have done so primarily upon the rationale that the civil, contractual nature of installment credit transactions controls.[92] Although the presence of an officer of the law implies the existence of behavior to which the fourth amendment restrictions generally attach, it has been pointed out that in the area of conditional sales contracts, all states permit a seller to independently retake the chattel if it can be done peacefully.[93] As such, it has

84. Comment, *supra* note 19, at 898.
85. *Id.*
86. *See* text accompanying note 54 *supra.*
87. *See* text accompanying notes 54 and 55 *supra.*
88. Laprease v. Raymours Furniture Co., 315 F. Supp. 722 (N.D.N.Y. 1970).
89. Comment, *supra* note 19, at 900.
90. *Id.*; *See also* United States v. ONE ARTICLE OF DEVICE LABELED SPECTOCHROME, 66 F. Supp. 754, 757 n.3 (D. Ore. 1946).
91. Comment, *supra* note 19, at 900; *See also* N.Y. CIV. PRAC. § 7110 (McKinney 1963) and FLA. STAT. ANN. § 78.10 (Supp. 1970) for statutes expressly permitting forcible entry by a sheriff; State v. Pope, 4 Wash. 2d 394, 400, 103 P.2d 1089, 1091-2 (1940) for an example of statutory interpretation.
92. *E.g.*, Fuentes v. Faircloth, 317 F. Supp. 954, 958 (S.D. Fla. 1970) *rev'd sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972). This case will be more fully discussed *infra* at p. 309.
93. Comment, *supra* note 19, at 901.

been argued that the presence of an officer of the law for the express purpose of minimizing violent confrontations should not logically restrict a seller's already existent rights by requiring a search warrant.[94]

Equal Protection

It is with the equal protection argument that the courts have had the most trouble in attempting to invalidate summary remedy statutes.[95] The argument advanced by proponents of the equal protection base rests upon two rationales which focus in on the redelivery process,[96] i.e. the means by which a debtor might reclaim the goods prior to a judgment on the merits. The primary objection appears to be that the amount which a debtor must post is set by the creditor at the time of the taking.[97] As a result, the knowledge that a debtor might seek to reclaim the goods could convince a creditor to post a higher bond. A second argument is that discrimination on the basis of economic status results in a situation where a creditor may be able to post a bond and the debtor may be financially unable to.[98]

The chief problem in setting forth an equal protection argument appears to be that, as with searches and seizures, the equal protection clause has had no historical applicability in the ordinary civil case.[99] The direct question involved is whether unequal treatment resulting from an unequal economic condition is constitutionally prohibited.

Justice Douglas' concurring opinion in the *Boddie* decision may have clarified the problem somewhat by stating that

> . . . the reach of the Equal Protection Clause is not definable with mathematical precision. But in spite of doubts by some, as it has been construed, rather definite guidelines have been developed. . . . Here, the invidious discrimination is based on one of the

94. *Id.*
95. *Id.*
96. By way of example *see*: N.Y. CIV. PRAC. § 7103(a) (McKinney 1963).
97. WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE § 7102.17 (1970).
98. Tamburro v. Trama, 59 Misc. 2d 488, 299 N.Y.S.2d 528 (Westchester County Court 1969).
99. *See, e.g.*, Boddie v. Connecticut, 286 F. Supp. 968, 973 (D. Conn. 1968), *rev'd*, 401 U.S. 371 (1971).

guidelines: *poverty*.[100]

In spite of this statement, Justice Douglas still viewed an equal protection argument as the narrower route to follow. A second concurring opinion by Justice Brennan saw the matter as a combination of due process and equal protection.[101] Thus, although the subject has been dealt with as a side issue, the U.S. Supreme Court appears to have refused a direct confrontation with equal protection implications where the subject is couched in terms of the unequal distribution of income within our economic society.[102]

THE OPPOSITION: CREDITOR ARGUMENTS

Although several major arguments have been postulated on the creditors' behalf, none appear to have faired well under judicial scrutiny.

Credit Will Be Harder To Obtain

A primary argument posed by creditors has been that eliminating the summary remedies will necessarily make credit more difficult to obtain.[103] In *Randone* it was contended that the availability of a general summary attachment procedure does serve a greater purpose than aiding a creditor in collecting his debts. It was urged that without a generally available summary remedy creditors would find it more difficult and thus more expensive to collect their debts. As a result, they would be obligated to raise credit rates and terminate the extension of credit to high-risk individuals, thus working as a detriment to the public's interest in liberalized credit.

As was pointed out by the *Randone* court, "there is no reason to believe that attachment has any necessary effect on the availability of credit."[104] Available credit can be restricted, stated the court,

100. *Id.* at 385 (Douglas, J., concurring).

101. *Id.* at 388 (Brennan, J., concurring).

102. *See also*: Sanks v. Georgia, 401 U.S. 144 (1971), where a state law requiring a tenant to post a bond before filing a defense to a dispossessory warrant and pay double rent in the case of an adverse judgment was challenged. On reargument, the U.S. Supreme Court refused to consider the constitutional claims in light of "intervening factors".

103. Randone v. Appellate Dep't, 5 Cal. 3d, at 555, 488 P.2d, at 25, 96 Cal. Rptr., at 721 (1971).

104. Brunn, *Wage Garnishment In California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1249 (1965). Data collected by Mr. Brunn revealed that although creditors contended that consumer credit would drop if wage garnishment was not continued in California, there appeared to be no empirical support for this contention. Creditors had argued that credit was harder to obtain in New York (where a creditor could garnish 10% of a debtor's wages) than in California (where a creditor could garnish 50%). However, empirical data from collection agencies and other sources revealed that credit is as easily available in New York as Cal-

only if a creditor grants or denies, say, a loan, on the basis of the availability of attachment.[105] In the average debt case, the collectibility depends not upon the attachment, but upon execution levies which make a debt fast and easy to collect,[106] and which are facilitated by the frequency of default judgments.[107]

Accepting *arguendo* the creditor argument that credit might be harder to obtain, a counterargument might be that in the long run such a result may prove beneficial to the public's interest by ultimately preventing the extention of credit to those who are unable to repay their debts.

The days of debt as something "faintly immoral" are long past. With the post World War II era of consumer spending emerged what has been called "the American way of debt."[108] Debt, which was not long ago discouraged is now very much a way of life—it is, in fact, encouraged—encouraged through liberal department store credit plans which solicit the potential customer by mail, and television ads emphasizing "easy terms" and a "fly now—pay later" philosophy.

Hand-in-hand with the expansion of debt have come even more complex changes in American buying characteristics. While credit saw its origins in the temporary extension of credit by the neighborhood market, consumer debt today is characterized by large, impersonal institutions (ever try tangling with Bank of America's computers?), complicated contract terms which may be incoherent to the average buyer, and high interest rates. These factors become important in light of reports that in a vast number of cases, the debt is a fraudulent one, trapping the poor and ignorant in an "easy credit nightmare."[109]

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ifornia; with $6.621 billion of installment credit extended in California and $6.124 billion in New York. Likewise, the study covered 5 other states, 3 of which exempted the entire family income from garnishment and 2 of which made garnishment freely available. The ratio of installment credit to retail sales varied very little between them.

105. Comment, *supra* note 4, at 846.

106. *Id.*

107. *Id.* at n.63; Brunn, *supra* note 104, at 1221.

108. Brunn, *supra* note 104, at 1243. In 1945 outstanding consumer credit totaled 5.7 billion dollars; in 1960, 56 billion dollars; in 1964, 76.8 billion dollars; in 1969, 116.597 billion dollars (these figures do not reflect mortgage indebtedness) *see* 55 FED. RESERVE BULL., at A54 (1969).

109. 114 CONG. REC. 1832 (1970) (remarks of Congressman Sullivan, Chairman, House Subcommittee on Consumer Affairs).

Granted that there is a great public interest in promoting easy credit, a resulting expansion of the economy, and thus a higher standard of living. But material comforts may come at too high a cost if collection devices may be employed which ultimately discount the very essence of consumer credit—the ability to repay. As enunciated by the California Assembly:

> It is a time-honored principle that consumer credit should be extended to those who are entitled to it on the basis of their stability, ability to pay, willingness to pay and according to their station in life as related to the articles purchased, but should be refused to those who do not qualify.[110]

Although such words may seem harsh, they take on a more plausible air in light of a Congressional report that one of the primary problems in the installment contract field is the detrimental effect on business stability caused by the extension of credit to buyers unable to live up to their obligations coupled with the inability of debtors to understand the complex terms of their agreements.[111]

The availability of summary remedies (coupled with the liberal extension of credit) may in many cases actually encourage both an unwise extension of credit by sellers, and an unwise use of credit by debtors.[112]

A creditor, especially a fraudulent one,[113] could thus find himself armed with the tools of an adhesion contract coupled with relatively inexpensive collection remedies. This combining of elements may place a defaulting buyer at the mercy of a dishonest creditor.[114] Ultimately, the result is the extension of credit to those whom creditors can reasonably expect will not be able to meet future payments.[115] Logically, this result could then be-

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110. Final Report of Subcommittee on Lending and Fiscal Agencies, Appendix to the Journal of the Assembly, Vol. 15, No. 22 (1959). This report consisted of testimony precedent to the passage of California's Unruh Act regulating consumer credit in installment contracts. It was hoped that the Act, by requiring interest rate disclosure and setting interest limitations, would result in a more careful extension of credit by retailers.

111. *Id.*

112. *See* the fact situation in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

113. One Los Angeles survey has revealed that 16% of those debtors who had allowed their payments to lapse had done so based upon the belief that they had been defrauded by their creditor. Nearly 61% of the lapses were attributed to illness, loss of work and pressure from other debts. *See*: WESTERN CENTER ON LAW AND POVERTY: IMPACT AND EXTENT OF WAGE GARNISHMENT IN LOS ANGELES COUNTY 11 (1968); *See also* Brunn, *supra* note 104, at 1245.

114. Comment, *supra* note 4, at n.60.

115. Randone v. Appellate Dep't, 5 Cal. 3d at 556, 488 P.2d at 26, 96 Cal. Rptr., at 722 (1971). *See also* Notes, *Attachment and Garnishment—*

come the impetus to continue the methods.

Yet it is clear that if the public does have an interest in the preservation of modern credit policies, then that interest "must be pursued through the use of methods which do not deprive debtors of their procedural due process rights."[116]

Like Thieves In The Night. . . .

The second major argument advanced by creditors is that the absence of the speed and efficiency of a summary remedy might induce a debtor to abscond with or conceal the disputed property as soon as he is notified of a pending action.[117]

As reasoned by the courts in both *Randone* and *Blair*, in some situations this danger may be very real, and under such circumstances a summary remedy might well correspond with constitutional principles. But neither statutory scheme challenged by either of these cases was drawn narrowly enough to encompass only such occasions, nor was a creditor required to point to special facts demonstrating an actual danger.

Most summary remedies are a step in the process of collecting by retailers against low-income wage-earning credit consumers.[118] Profiles of average debtors who are the subject of summary remedies indicate that they have lived in the same city for over 20 years, 80% attend church regularly, and most have a record of steady employment.[119] In view of this, it is unlikely that the majority of such debtors will fold their tents in the night and silently steal away.

THE FUENTES CASE: CULMINATION OF A TREND—JUNE 12, 1972

Origins

In June, 1967, Mrs. Margerita Fuentes, a Miami factory worker,

Garnishment of Wages Prior to Judgment Is A Denial of Due Process: The Sniadach Case and Its Implications for Related Areas of the Law, 68 MICH. LAW REV. 986, 997 (1970).

116. Randone v. Appellate Dep't, 5 Cal. 3d at 556, 488 P.2d, at 26, 96 Cal. Rptr., at 722 (1971). *See also* Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

117. Randone v. Appellate Dep't, 5 Cal. 3d at 556, 488 P.2d, at 26, 96 Cal. Rptr., at 722.

118. Brunn, *supra* note 104, at 1215.

119. WESTERN CENTER ON LAW AND POVERTY, *supra* note 113.

purchased a gas stove under a warranty from Firestone Tire and Rubber Co. In November, 1967, she purchased a stereo. Both items were bought under similar conditional sales contracts which provided that in case of any default in payments, the seller, at his option could take back the merchandise. The cash price of Mrs. Fuentes' purchases totaled close to $500.00. The finance charges totaled over $100.00.

When the stove broke and Firestone refused to fix it, Mrs. Fuentes stopped paying.

Then on September 15, 1967, several months after Mrs. Fuentes had fallen behind in payments totaling some $204.00 and had received notice to pay or return the goods, Firestone initiated a small claims action against her. Simultaneously, but before Mrs. Fuentes received notice of the pending action, Firestone obtained a writ of replevin ordering the sheriff to seize the goods. That same day a sheriff knocked on Mrs. Fuentes' door. As she could speak little English, a communications problem developed, and after a short verbal skirmish with both Mrs. Fuentes' son-in-law and daughter-in-law, two Firestone representatives, who had been waiting outside in their truck, were allowed to enter and take the stove and stereo.

Mrs. Fuentes thereupon brought an action against Firestone and the Attorney General of Florida, seeking declaratory and injunctive relief against Florida's replevin statutes.[120] She based her case upon two rationales, first, that the statutes violated the Due Process Clause of the fourteenth amendment in that they provided no notice or prior hearing[121] and second, that they violated the fourth and fourteenth amendments in that the statutes authorized a search and seizure without a warrant.[122]

Florida law provided that for a writ of replevin to issue, Firestone need only file a complaint initiating an action to repossess the goods, and then reciting that it was lawfully entitled to possession, and posting a security bond for twice the value of the property, the clerk of the court was authorized to sign and stamp the documents and summarily issue the writ.[123] There need be no proof that the goods were in fact being wrongfully detained.[124] In addition, if the

120. Fuentes v. Faircloth, 317 F. Supp., at 954 (S.D. Fla. 1970).

121. Mrs. Fuentes admitted that she had allowed payments to lapse but she contended that she had a meritorious defense in that the stove was mechanically defective and Firestone would not make satisfactory repairs.

122. Fuentes v. Faircloth, 317 F. Supp. at 956.

123. Law of 1955, ch. 29706, § 1, (1955) Fla. Laws, 78.01 (originally enacted as Act of March 11, 1845, § 1).

124. *Id.*

goods were in a dwelling, the writ permitted the sheriff to enter forcibly to retake the goods.[125] The seizing officer then must retain the goods for three days during which time the buyer who has been repossessed could retrieve the goods by posting his own security bond for twice the value of the property.[126] If the buyer (the replevin defendant) did not post his bond within the three-day limit, the property would then go to the party first seeking the writ.[127] Eventually, a hearing would be held on the replevin plaintiff's original repossession action.

A three-judge federal district court for the Southern District of Florida rejected Mrs. Fuentes' contentions and upheld the Florida statutes, concluding that:

> . . . there are still situations in which prejudgment seizure of goods without a prior hearing is valid . . . and . . . replevin pursuant to a contract which authorizes a conditional seller to repossess in order to protect his security interest in the goods which are the subject of the contract is one of those situations.[128]

In her due process argument, Mrs. Fuentes had relied heavily on *Sniadach*[129] and *Boddie*,[130] contending that the fourteenth amendment prohibits repossession by a conditional seller without first giving the vendee the benefit of a prior hearing.[131] The Florida court found neither case controlling.

Instead, the *Fuentes* court utilized the rationale of the then-recent *Brunswick*[132] decision, which had expressly rejected the due process argument advanced by its replevin defendant. Like the *Brunswick* court, the *Fuentes* court interpreted *Sniadach* narrowly, preferring to see it as a special case dealing only with wages.[133] The focus of *Fuentes* was upon the contractual agreement itself,

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125. *Id.* at § 78.10.
126. *Id.*, Mrs. Fuentes contended that she was never informed of her three-day right to redeem the goods, and that the sheriff immediately turned the goods over to the Firestone representatives waiting outside. Additionally she asserted that out of 442 cases of prejudgment replevin in Florida's Dade County small claims court in 1969, not one defendant took advantage of the recovery provisions.
127. *Id.*
128. 317 F. Supp. at 958.
129. 395 U.S. 337.
130. 401 U.S. 371.
131. 317 F. Supp. at 957.
132. *See* text accompanying note 22 *supra*.
133. Fuentes v. Faircloth, 317 F. Supp. at 957 (S.D. Fla. 1970).

which clearly called for possible repossession on default. The court would not hear objections to a procedure which the parties had contractually agreed to.[134]

Mrs. Fuentes had attempted to distinguish *Brunswick* on the grounds that in her case, a private party had contracted with a commercial party while in *Brunswick* two commercial parties of equal bargaining power were involved.[135] This contention was summarily disposed of by the court, which found this a "distinction without a difference. . . ."[136]

More technically, Mrs. Fuentes contended that the buyer in *Brunswick* had admitted default. She argued that since Firestone had breached its contract with her by failing to provide repairs, she could not be said to be in default for refusing to make payments.[137] But once again the court referred to the contractual provisions which expressly gave Firestone the right to repossess in the event of "default *of any payment or payments*"[138] and not merely upon "default." Thus Firestone's repossession rights were defined in terms of its remedies should the buyer fall behind in any payments,[139] presumably for any reason.

Likewise, the court found the contract dispositive of Mrs. Fuentes' fourth amendment argument, thereby disregarding the effects of *Camara* and *See*.[140] Instead, the court opted for the ancient 1856 holding of *Murray's Lessee v. Hoboken Land and Improvement Co.*[141] which had held that the fourth amendment "has no reference to civil proceedings for the recovery of debts."[142] The court reasoned that even if, *arguendo*, the fourth amendment provisions applied, the Fuentes seizure was a peaceful one[143] and thus did not violate any statutory requirements.[144] The court concluded that absent authorization for a forcible taking, the fourth amendment does not preclude parties to a conditional sales contract from contracting for a peaceful repossession.[145]

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134. Brunswick v. J & P Inc., 424 F.2d, at 105 (10th Cir. 1970). Cited in Fuentes v. Faircloth, 317 F. Supp., at 957 (S.D. Fla. 1970).
135. *Id.*
136. *Id.*
137. *Id.* at 958.
138. *Id.*
139. *Id.*
140. *See* text accompanying notes 54 and 55 *supra*.
141. 59 U.S. 272 (1856).
142. *Id.* at 285.
143. Even admitting the reluctance of Mrs. Fuentes to allow entry to the repossessors.
144. Laws of 1927, § 5338 (1927) Fla. Laws 78.10 (originally enacted as Act of March 11, 1845, § 7).
145. Fuentes v. Faircloth, 317 F. Supp., at 958 (S.D. Fla. 1970).

Two years after Mrs. Fuentes' repossession occurred, on February 1, 1969, Paul Parham, a citizen of Pennsylvania, entered into an installment sales contract similar to that signed by Mrs. Fuentes. Likewise, his contract permitted the seller to repossess the furniture he had purchased should he default in payments. When default did occur, and following repeated telephone and written communications urging payment, the seller, Sears, Roebuck and Co., repossessed the furniture pursuant to a writ of replevin and in conformance with existing Pennsylvania law.

Joining with two other Pennsylvania citizens who had suffered similar experiences—one Michael Epps and one Rosa Washington—a class action was instituted against each of their respective creditors[146] challenging the state replevin statutes.[147] The plaintiffs sought a permanent injunction restraining the Prothonotary of the Courts of Philadelphia County and the Sheriff of Philadelphia County from issuing and executing any further writs of replevin.

The statutes at issue were essentially the same as Florida's. The greatest exception appears to have been that unlike Florida, Pennsylvania did not require that a hearing ever be held to present the merits of the conflicting claims.[148] Although there was an established hearing procedure, it was an option open to the creditor which he might or might not elect to pursue.[149] In order to get any hearing at all, the person who had lost the property must have initiated a suit himself within 20 days after he had been served with the writ.[150] Or, he might post his own counterbond within three days after seizure to regain possession of the goods.[151]

The Pennsylvania plaintiffs challenged the state procedure on three grounds: due process, equal protection and fourth amendment.

The court maintained that due process had not been violated since the defendant was given notice, albeit at the time of the taking itself, and since the defendants could have retrieved the goods

146. On Mrs. Washington's part, her action was brought against her husband.
147. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971).
148. Law of June 25, 1946, (1946) 12 Penn. Rules of Civil Proc. 1073.
149. *Id.*
150. *Id.* at 1037.
151. *Id.* at 1076.

and/or challenged the temporary taking, the requirement of a "hearing" had been complied with.[152] Thus the court could find no irreparable harm or unconscionable hardships "akin to those suffered in *Sniadach, Goldberg,* and the related cases cited by (the) plaintiffs."[153] Rather, the state and creditor interests adverted to in *Sniadach*[154] were present in that the state had a prevailing interest since summary seizure "conserves State financial resources and administrative time in reducing the number of evidentiary hearings in a given lawsuit."[155]

The equal protection argument was dismissed on the grounds that but for the stated fact that the plaintiff Epps earned in excess of $10,000.00 per year, the record was altogether silent on the economic status of the plaintiffs.[156] As such, the court would not consider the issue.

The fourth amendment argument found its basis in the *Fuentes* decision.[157] The court reasoned that since the seizures had not been at unreasonable hours, had not been forceful and were primarily civil in nature, the fourth amendment did not apply.[158]

When the smoke of the lower court battles had cleared in Florida and Pennsylvania, the groundwork was set for joint appeals to the U.S. Supreme Court. Thus a prime opportunity had arisen for that court to not only clarify the scope of *Sniadach,* but to lay to rest the problems which had ensued during the three-year struggle to clarify the *Sniadach* ruling as applied to summary creditor remedies.

Undoing Wrongs Already Done . . .

On June 12, 1972, the U.S. Supreme Court rendered its decision in the joint cases of *Fuentes* and *Epps.*[159] Mr. Justice Potter Stewart writing for the 4-3 majority[160] held that a consumer who falls behind in payments has a constitutional right to a hearing before any of his goods can be repossessed. As such, the Supreme Court viewed the replevin provisions of Florida and Pennsylvania as evil —albeit to different degrees.[161]

152. Epps v. Cortese, 326 F. Supp. at 135 (1971).
153. *Id.* at 134.
154. *Id.* at 135.
155. *Id.*
156. *Id.* at 137.
157. *Id.*
158. *Id.*
159. Fuentes v. Shevin, 407 U.S. 67 (1972).
160. Justices Lewis Powell, Jr. and William Rehnquist did not take part in the decision since the case was argued before they were appointed to the bench.
161. 407 U.S. at 73.

The principle base upon which the decision rested was the procedural due process argument. Specifically, it was found that the states' statutes were defective for failing to provide hearings "at a meaningful time."[162] Although Florida had provided a hearing after seizure and Pennsylvania allowed a post-seizure hearing if the aggrieved party voluntarily shouldered the burden of initiating one,[163] neither provided a *prior* hearing. The crux of the controversy thus centered around the propriety of a state's participation in *ex parte* summary remedies.[164] The concern in this area, stated the Court, rests not so much with abstract terms of "fair play"[165] as with the need to protect an individual's use and possession of property from arbitrary encroachment and mistaken deprivations.[166] Fairness, reasoned the Court, could best be obtained when an adverse party has a chance to speak up in his own behalf.[167] Although a later hearing might return an individual's property to him if it was unfairly or mistakenly taken in the first place—and damages might even be awarded—it would not erase the fact that a wrongful taking had occurred.[168] "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone."[169]

For purposes of the *Fuentes* decision, it is clear that the right to a prior hearing attaches only to a deprivation of an interest encompassed within the protection of the fourteenth amendment.[170] As such, the Court found itself having to clarify several issues.

Deprivation Defined

The first problem faced by the Court was defining exactly what constitutes a "deprivation" within the context of the fourteenth

162. *Id.* at 1994.
163. *See* discussion of Florida and Pennsylvania replevin procedures at pp. 310-314 *supra.*
164. A judicial proceeding is said to be *ex parte* if it is taken or granted at the request and for the benefit of one party only, and without notice to, or contestation by any person adversely interested. BLACK'S LAW DICTIONARY 661 (4th ed. 1968).
165. This concept had been emphasized by Mr. Justice Harlan in his concurring opinion in *Sniadach,* 395 U.S. 337 (1969).
166. 407 U.S. at 81.
167. *Id.*
168. *Id.*
169. *Id.* at 82.
170. *Id.*

amendment. Citing *Sniadach,* the Court stated that even a temporary, nonfinal taking of property is a deprivation.[171] Although a replevin defendant like Mrs. Fuentes had a three-day period during which the goods could be returned, it was forcefully argued that very few persons in a replevin defendant's position are financially able to post the required bond, even if they know of the existence of the possibility.[172] As the Court stated:

> The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.[173]

It is clear that although the length and severity of a taking may be factors to weigh in determining the appropriate type of hearing, they are not in themselves decisive of some kind of prior hearing.[174]

Significant Property Interests

The Court then had to face the problem of defining what a "significant property interest" is. The question undoubtedly arose because appellants Fuentes and Parham actually lacked full, legal title to the goods in their possession—having purchased under conditional sales agreements. Upon default, the question of ownership was put into dispute. The Court in this respect noted that the fourteenth amendment's protection of property has never been interpreted as safeguarding only the rights of undisputed ownership.[175] The fact that appellants had agreed to pay a major financing charge and at the time of the repossessions had made substantial payments[176] was thought clearly sufficient to bring into play the protection of the fourteenth amendment.[177]

Necessities of Life

A final problem apparently settled by the *Fuentes* court was the determining of what is a "necessity of life." Since the *Sniadach* decision and its language couched in terms of "the special quality of wages,"[178] the state courts had bantered about the question of

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171. *Id.*
172. *Id.* at 84-85.
173. *Id.* at 86.
174. *Id.*
175. *Id.*
176. At the time of the taking Mrs. Fuentes owed $200. The original bill had been close to $600.
177. 407 U.S. at 86.
178. Sniadach v. Family Finance, 395 U.S. 337 (1969).

whether the property with which each was then dealing fell within *Sniadach's* "special quality" category.[179] Instead of deciding whether or not household items do indeed fall within the enunciated protections of *Sniadach's* language, the *Fuentes* Court in a most perfunctory manner divorced the entire question of "necessities" from the issue of procedural due process.[180] The whole problem, noted the Court, arose because *Sniadach* and *Goldberg* had been read too narrowly. Rather, both of these decisions had been "in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life . . . ."[181] As such, due process principles are not to be limited to the protection of a few types of property. *Sniadach* and *Goldberg* merely "emphasized" the importance of certain interests—they did not limit the due process concepts to certain interests.[182]

Additionally, although the Court recognized that there may indeed be gradations in the importance of various consumer goods, the "root principle" of procedural due process, if it is to be objectively applied, cannot rest on these distinctions.[183] When the fourteenth amendment speaks of "property" it speaks in general terms. It does not become the business of a court to make an individual evaluation of what is or is not "necessary."[184] The *Fuentes* court recognized that subjectively, "necessity" distinctions are not feasible since it can be argued that all property should be protected—stoves and wages alike. Realistically, courts could not consistently draw the line as to what is or is not "necessary."

The *Fuentes* court found a fatal flaw not only in the theory advanced by the creditors, but in the contract itself. It had been contended that by signing the conditional sales contract the debtors

179. For an argument which includes household goods as well as wages, *see* Laprease v. Raymours Furniture, 315 F. Supp. at 722. There, the court stated that "Beds, stoves, mattresses . . . and other necessities for ordinary day to day living are, like wages in *Sniadach,* a 'specialized type of property presenting distinct problems in our economic system,' the taking of which on the unilateral command of an adverse party 'may impose tremendous hardships' on purchasers of these essentials." For a negative criticism of such line-drawing *see* Comment, *supra* note 19, at 896.
180. 407 U.S. at 89.
181. *Id.*
182. *Id.*
183. *Id.* at 89-90.
184. *Id.* at 90.

had waived their procedural due process rights whether or not the contract specifically called for repossession.[185] In both the *Fuentes* and *Parham* cases terms of repossession were included in the printed form contracts and appeared in small type unaccompanied by explanation.

In deciding the question of waiver, the *Fuentes* court set forth four criteria for a waiver's validity:[186]

(a) there has been bargaining by both parties over the terms of the contract
(b) there is a balance of bargaining power between parties
(c) the provisions are not merely a printed part of the contract and a necessary condition of sale
(d) the debtor has been made aware or is already aware of the significance of the provisions

At the very least, any waiver provision must be clear on its face.[187] In the instant case, the contracts had merely provided for repossession upon default. The contracts did not indicate how or by what process the seller could repossess. As such there was no voluntary, intelligent waiver of the specific right to a hearing prior to the repossession.[188]

The *Fuentes* dissent, written by Mr. Justice White and joined in by the Chief Justice and Mr. Justice Blackmun rested upon three bases. First, that appellants Parham and Fuentes had not exhausted all of their procedural remedies since they had ample opportunity to raise any issues they had in the state court proceedings then pending.[189] Second, Mr. Justice White contended that the majority had wholly neglected the creditor interests in the matter. Between the time of default and the final adjudication the interests of the buyer and seller are naturally antagonistic. The buyer wishes to continue using the property pending a final judgment, and the seller wishes to prevent further use and deterioration in his security interest. The dissenters felt that the existing laws were commendable since the buyer might temporarily lose the use of the property, but he is at the same time "protected against loss."[190] To the dissenters the issue was quite simple—either the

185. *Id.* at 94.
186. *Id.* at 94-95.
187. *Id.* at 95.
188. *Id.*
189. *Id.* at 99.
190. The dissenters do not make clear the meaning of "protected against loss." One can only suspect that they are drawing a theoretical distinction between the "lesser" evil of temporary loss of use and permanent loss of the property itself. The majority opinion contended that such a theoretical distinction is without merit since a temporary physical loss amounts to a permanent loss of use over a given period of time.

buyer has defaulted, or he has not.[191] If he has, then it is both fair and essential that the seller be allowed to repossess. They did not see the threat of mistaken claims as sufficient to justify a prior hearing.[192] Curiously deleted from their argument is any attempt to deal with the majority's claim that *arbitrary* as well as mistaken claims must be protected against. At the very least, observed the dissenters, a defaulting buyer should be required to make his defaulted payments into court.[193]

Third, implies the dissent, a seller could evade the court's ruling simply by making it clear at the outset that the buyer is waiving his procedural due process rights and that the seller can repossess without a hearing.[194] All the seller need do is be sure that the buyer is *correctly* waiving his rights. To the dissent, it is unlikely that a prior hearing would do any more than the existing laws already do.[195] As it noted, "the procedure which the court strikes down is not some barbaric hangover from bygone days."[196]

Several items should be borne in mind in light of the *Fuentes* decision. First, *Fuentes* considered state action in *ex parte* suits. It did not comment on what its course of action would have been had the repossessions been effectuated through private, rather than state action. Thus this very related question and an equally complex one must be left for further judicial consideration.[197]

Second, Mrs. Fuentes had paid about two-thirds of her contractual obligation. The court found that this was a "significant property interest" on her part. But the court failed to say at what point in a given contract a buyer possesses such an interest sufficient to bring him within the protection of the fourteenth amendment. Does a buyer merit such protection after having paid fifty dollars of a $600 bill? Perhaps the question is best left to a case-by-case analysis. But it does seem to leave the issue open for challenge by creditors. Although this may prove a straw dog, it ap-

191. 407 U.S. at 100.
192. *Id.*
193. *Id.* at 102.
194. *Id.*
195. *Id.*
196. *Id.*
197. The question is considered in Adams v. Egley's Recovery Service, 338 F. Supp. 613 (S.D. Cal. 1972).

pears to have inherent within it the same line-drawing problems faced in the "necessities" issue.

Third, although Mrs. Fuentes based her argument in part on the fourth amendment, the court saw no need to decide that issue, reasoning that once a prior hearing is required and the strength of a creditor's claim is tested, the fourth amendment problem is obviated.[198]

Even though the court did not decide the issue, a hint as to its potential disposition (should the question ever arise more directly) might well be found in Footnote 30. Here, the court draws a sharp distinction between writs of replevin and seizure of goods under a search warrant. First, a search warrant is designed to serve "a highly important governmental need," i.e. the apprehension and conviction of criminals rather than to serve the private needs of individuals. Second, a search warrant is issued under circumstances where prompt action is needed to prevent the destruction or withholding of evidence. Third, the fourth amendment guarantees that a state will not issue a warrant merely upon application of a private party. Thus, unlike in the replevin statutes at issue,[199] the state does not abdicate control over search warrants since there must be a showing of probable cause prior to the issuance of a warrant.

By setting forth these distinctions, it is clear that the court saw it better to decide the replevin question solely in terms of due process. As such, there may have been a genuine fear that should situations requiring replevin be drawn analogous to those involving the fourth amendment, the reverse might also be applied. Thus the court made it clear that the *Fuentes* decision "in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued."[200]

In reaching its conclusions, the *Fuentes* court maintained a narrow posture. It did not question the power of the State to seize goods prior to a final adjudication in order to protect the security interest of a creditor—as long as the creditor's claim is tested and found valid by a fair hearing. In turn, the method employed to test a creditor's claim was clearly left to each state's legislature. This, in keeping with the concept that although the form of procedural

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198. *See* Fuentes v. Shevin, 407 U.S. at 96.
199. *Id.* at 93; the court pointed out that the replevin statutes at issue revealed that although the state was the arm of the enforcement, the state itself acted largely in the dark—with little or no state control over the actual replevin.
200. *Id.* at n.30.

due process may vary, the basic requirements, e.g. notice and a prior hearing, do not.

AFTERMATH

Fuentes did settle some of the questions which had been plaguing the courts since *Sniadach*. The decision will undoubtedly have great impact in those states which did not initiate the *Fuentes* procedural requirements prior to the decision itself. But, at least in California, the ruling can be viewed in one sense as anticlimactic and in another sense as incomplete.

It appears at this time that the decision will not make a dramatic change in California procedures.[201] Adversary hearings such as those called for in *Fuentes* have been law in California since early 1972—the result of the *Randone* case.[202] As the procedure now stands, items can be attached pursuant to a writ of replevin only after an *ex parte* hearing where it has been shown that besides the creditor's having a legitimate claim, irreparable injury would be suffered if the goods were not attached. In this respect, each case is weighed on its own merits.

If a creditor can show irreparable injury, an item can be attached immediately and the debtor may come down the very next day and appeal the action. Injury to the debtor, it has been explained,[203] will be very slight since the courts are open every afternoon for *ex parte* matters. Although the greater number of such hearings involve businesses, of those involving the wage earner, most concern new automobiles.[204]

In the Municipal Court of the Los Angeles District, fewer requests for writs of attachment have been made since *Randone*.[205] The Clerk's office there reports that writs for attachment were down 80% in 1972 and the court itself has held only two adversary hearings.[206]

In San Diego, the County Sheriff's Civil Bureau has reported that its claim and delivery actions have ceased—this, in response to

201. *See* comments by Los Angeles Superior Court Judge Robert A. Wenke: 85 LOS ANGELES DAILY JOURNAL 1 (No. 119, June 15, 1972).
202. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709.
203. Comments by Judge Robert A. Wenke, *supra* note 201.
204. *Id.*
205. LOS ANGELES DAILY JOURNAL, *supra* note 201,
206. *Id.*

the *Blair* decision.[207] To the knowledge of a spokesman for the Bureau, there has not been a state aided repossession or claim and delivery this year. This is a significant break-off from the average two per month of last year. Thus it appears that as a result of earlier California decisions, *Fuentes* did not come as a shock to state procedure, but rather as an anticlimax.

On the other hand *Fuentes* may be viewed as not having gone far enough. Although the decision did resolve state-assisted summary remedy questions, it did not resolve a four month old California debate over how a private creditor might repossess without the aid of state officers.

On February 11, 1972, U.S. District Judge Leland C. Nielson in San Diego ruled that notice and hearing are also required before a creditor can repossess items himself or hire someone to do it for him.[208] Although the decision caused a temporary halt in private repossessions, two weeks later U.S. District Judge Spencer Williams in San Francisco ruled that his court did not have jurisdiction in such matters.[209]

Given the resultant conflict most lenders proceeded to abandon curbs they had instituted after the Nielson decision.[210] As stated by the vice president of a major banking institution, "they haven't given us a final opinion, so on an operating basis, we decided to go ahead as always."[211]

Although *Fuentes* leaves a larger question yet unanswered, it may at least give some indication of the way in which the court is leaning.

UNRESOLVED: PRIVATE REPOSSESSION PROCEDURES

In light of the cases considered thus far, and supported now by the *Fuentes* decision, consumer advocates are contending that extrajudicial takings pursuant to conditional sales contract provisions suffer the same constitutional infirmities as judicial takings prior to *Blair, Randone,* and *Fuentes.*[212] The counterargument being ad-

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207. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42.
208. Adams v. Egley, 338 F. Supp. 613 (S.D. Cal. 1972).
209. Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972). The problem of federal jurisdiction claims is discussed *infra* at p. 325.
210. Fisher, *Repossessors Active As Court Scare Fades,* Los Angeles Times, June 19, 1972 (Part III), at 13, col. 6. Al Hartgraves, President of Western Adjusters, a private repossessing company, stated that with the exception of some out-of-state creditors, most lenders are continuing to order repossessions.
211. *Id.*
212. Ordin, *supra* note 47, at 238.

vanced by creditors is that unlike the latter seizures, takings by private persons pursuant to valid contract provisions are not subject to regulation by due process and search and seizure principles,[213] which apply only where there is state action.

In response to this argument it has been pointed out that there are various California statutes regulating "private taking." More specifically, there is the Unruh Act, §§ 1801 *et seq.* which define the rights of a retail seller who retains a security interest to retake goods upon any default, pursuant to rights granted in the given contract. Although the dispossessed buyer has a ten-day period in which to redeem the goods,[214] this redemption power may be limited by the seller's right to demand full payment before the goods can be redeemed.[215] Additionally, the section does not provide for prior notice or an opportunity to protest the taking before the repossession occurs.

The Rees-Levering Act governing the sales of automobiles provides that the seller of an automobile may repossess it upon the buyer's default in payment,[216] and the California Uniform Commercial Code §§ 9503 and 9504 regulate repossession and disposition of collateral by a secured party.

It is forcefully argued by some that even if these statutes are repealed or declared unconstitutional, such decisions as *Reitman v. Mulkey*[217] require a finding that the state, through condonation of private repossession, has in fact become a participant such that the fourteenth amendment becomes applicable to private takings as well as state-assisted takings. One could point out that the *Randone* court could well have been contemplating such an argument when in a piece of "significant dictum" it stated that:

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213. *Id.*
214. CAL. CIV. CODE § 1812.2 (West 1964).
215. *Id.*
216. CAL. CIV. CODE §§ 2981 *et seq.* (West 1964).
217. Reitman v. Mulkey, 387 U.S. 369 (1966). In this case, the U.S. Supreme Court affirmed *sub nom.* the California Supreme Court decision that Article I, Section 26 of the California Constitution (which repealed existing "fair housing laws" and made passage of future laws possible only by constitutional amendment) was unconstitutional; the court accepting the reasoning of the California Supreme Court that the allegedly neutral position taken by the state was in fact approval of private acts of discrimination. *See also* Ordin, *supra* note 47, at n.47. *Reitman* gives the broadest possible interpretation of state action. It is questionable whether such a broad test will be upheld in all areas of the law.

> Indeed, California courts have long preserved the individual's right to notice and a meaningful hearing in instances in which a significant deprivation is threatened by a private entity as well as a governmental body.[218]

Even if it is found that there is insufficient state action in extrajudicial repossessions to invoke the protections of the fourteenth amendment, it does not necessarily follow that creditors will prevail in enforcing such private repossessions. Both in *Blair* and *Fuentes* the courts were very skeptical about the alleged "consent" contained in adhesion contracts.[219] If an adhesion provision in a printed contract cannot constitute an effective waiver, it is also unlikely that the provision will be found to be an enforceable contractual consent to an extrajudicial taking.[220]

Therefore it is clear that it may be even more difficult to determine the constitutionality of private takings than judicial takings. But it is a question that needs a speedy answer, for at present there exists an anomoly in the California law. On one hand, creditors cannot use statutory procedures which have been enforced through the use of sheriffs or marshalls, yet creditors may effect essentially the same type of summary taking through "self help."[221] It may seem sheer judicial hypocrisy to assert that procedural safeguards are necessary when an officer of the law comes to the door, but such safeguards are not required when a creditor uses self help to effectuate the same purposes.[222] Either way, the debtor is subject to the same acts. It might even be argued that procedurally, the potential for abuse is even greater in a self help situation. It would defy logic to apply safeguards to one situation but not the other.

Adams v. Egley: Extrajudicial Takings Squarely Faced

The question of the constitutionality of extrajudicial repossession is now being hotly contested in the California District courts. The case squarely presenting the issues is the February 11, 1972 decision of San Diego District Court Judge Leland C. Nielson in *Adams v. Egley's Recovery Service*[223] and the companion case *Posadas v. Star*

218. 5 Cal. 3d at 550 n.11, 488 P.2d at 22, 96 Cal. Rptr. at 718 (citations omitted).

219. Blair v. Pitchess, 5 Cal. 3d at 275, 486 P.2d at 1254, 96 Cal. Rptr. at 54 (1971); Fuentes v. Shevin, 407 U.S. 67 (1972); and *see* Ordin, *supra* note 47, at 239.

220. *Id.*

221. *See* Ordin, *supra* note 47, at 240.

222. *Id.*

223. Adams v. Egley, 338 F. Supp. 613 (S.D. Cal. 1972); for a Florida decision in agreement with *Adams, see* McCormick v. First National Bank of Miami, 322 F. Supp. 604 (S.D. Fla. 1971).

and Crescent.[224]

Plaintiffs in both actions had borrowed sums of money and had, pursuant to security agreements, offered an automobile (*Adams*) and a truck (*Star*) as security. Both security agreements provided that in case of default of any term or condition of the security agreement or promissory notes, the secured party would be entitled to repossess the security according to law. The law in question in the case is specifically California Uniform Commercial Code §§ 9-503 and 9-504 which provide for the repossession and disposition of collateral by a secured party after default by a debtor.[225]

The first question considered by the *Adams* court was whether it had jurisdiction over the case at all. Plaintiffs had asserted two bases of jurisdiction: federal question jurisdiction under 28 U.S.C. § 1331, and jurisdiction under the Civil Rights Act, 28 U.S.C. § 1343 and 42 U.S.C. § 1983. The federal question purportedly raised was whether such extrajudicial repossession violated the due process provisions of the fourteenth amendment. The Civil Rights sections provide for a judicial remedy where one is deprived of any constitutional or statutory right by any person acting "under color" of state law. It was fundamental to either basis of jurisdiction to find that there was significant state action in the alleged wrongful acts.

The defendant-creditor challenged the jurisdiction of the court on the basis that what was involved was private contracts with self-executing terms. Unlike prior cases involving attachment, replevin, or claim and delivery, what was involved was self help. Therefore by private agreement the creditor either by himself or by means of a private collection agency can enter onto the debtor's premises and repossess the goods in dispute—all without the aid of any state official. Therefore they argued that there was no state action upon which to found federal jurisdiction.

The *Adams* court did not agree. Citing *Reitman v. Mulkey*[226] the court stated that

224. Posadas v. Star and Crescent, Federal Credit Union, 338 F. Supp. 614 (S.D. Cal. 1972).

225. Section 9-503 provides that a secured party may proceed to take possession without judicial process if this can be done without a breach of the peace. Further, Section 9-504 allows the secured party to dispose of the property by "selling, leasing, or otherwise" disposing of it in a "commercially reasonable manner."

226. 387 U.S. 369 (1966).

> . . . in the mere enactment of the statute (authorizing private repossession) state involvement (is) sufficient to bring the alleged acts . . . within the purview of the Fourteenth Amendment.[227]

Although admittedly the repossessions were private acts pursuant to contractual provisions, the court found that Sections 9-503 and 9-504 unquestionably had a significant impact on the content of the contractual provisions.[228] Indeed, both contracts had either specifically referred to the provisions or "the law governing repossessions." The court reasoned that there was ample indication that the creditors were persuaded or induced to include repossession by the fact that such procedures were permitted by the statutes.[229] As stated by the court:

> These Commercial Code sections set forth a state policy, and the security agreements upon which the instant actions rest, whose terms are authorized by the statute and which incorporate its provisions, are merely an embodiment of that policy.[230]

Once the question of jurisdiction had been settled, the primary issue, whether the repossession in question violated procedural due process requirements, came easily. It must be remembered that since *Adams* was decided four months before *Fuentes* made clear the scope to be given *Sniadach*, the *Adams* court faced the decision of how broad a scope *Sniadach* and its progeny were to be given. The court opted for a broad view of that case, deciding that a statute providing for private repossession without notice or hearing is not exempt from constitutional scrutiny merely because its operation is confined to situations involving the presence of a contract.[231]

At any rate, even though the contract itself may be valid, the *Adams* court challenged the validity of the argument that such rights had been contractually waived,[232] noting that the presumption against contractual waiver of rights is well settled,[233] particu-

227. 338 F. Supp. 617.

228. *Id.*

229. *Id.* But be sure to note the counterargument advanced in *Oller,* 342 F. Supp. 21 (N.D. Cal. 1972). In addition, a case presenting the identical problem of state action in regard to the New Jersey U.C.C. provisions (equivalent to Sections 9-503 and 9-504 of the California U.C.C.) has been decided. Following a discussion of *Adams* and *Oller,* it reached the conclusion that there had not been state action. It based this decision on the fact that self-help is a pre-Code remedy and was specifically written into Section 9-503. Messenger v. Sandy Motors, Inc., 41 U.S.L.W. 2211 (October 24, 1972).

230. *Id.* at 618.

231. *Id.* at 620.

232. The creditors had set forth this argument and had relied heavily on *Brunswick,* 424 F.2d 100 (10th Cir. 1970).

233. *See, e.g.,* Glasser v. United States, 315 U.S. 60 (1942); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *prob. jur. noted,* 401 U.S. 991 (1971).

larly where the parties are not of equal bargaining power and an "adhesion contract" is involved. The court reasoned that if the provisions of a contract can legitimize summary repossession, even wage garnishment might be valid under the same theory as long as private agreement could be shown.[234] Such an argument was rejected by *Adams* as flying in the face of *Sniadach* reasoning.

In turn, by ascertaining the significance of the identities of the parties to the agreement, *Adams* intimates that where the parties are of equal bargaining power a waiver might indeed be effective.[235] But as may be pointed out, neither Section 9-503 nor 9-504 is drawn narrowly enough to confine its application to parties of equal bargaining power.[236]

It may also be noted that the *Adams* court was also struggling with the problem of "daily necessities."[237] This problem has since been resolved by the *Fuentes* decision[238] and need not be considered further here.

The *Adams* ruling ended in a note of hesitancy concerning the current judicial trend in that Judge Nielson foresaw possible rises in prices and interest rates as an outgrowth of restraints on creditors.[239] This fear is based on the premise that creditors traditionally exercise "considerable flexibility and exhaust all alternatives" before resorting to summary actions.[240] This note by the court should be prefaced by the term "reputable." But it is not at such creditors that such decisions are ultimately aimed. If a creditor is honest, constitutional tenets will not be greeted with hostility. On the other hand, dishonest business practices, whether initiated by state or private interests, will either fold or be subjected to judicial scrutiny.

The *Adams* case is currently being appealed before the 9th Circuit Court of Appeals and it may be some time before a final decision is reached—perhaps not until the summer of 1973. Undoubtedly the state action issues and jurisdictional question loom as the

234. Adams v. Egley, 338 F. Supp. at 621 (S.D. Cal. 1972).
235. *Id.*
236. *Id.*
237. *Id.*
238. *See* discussion accompanying the text of n.180 *supra.*
239. 338 F. Supp. at 622.
240. *Id.*

greatest problems. But given the trend of cases up to the *Fuentes* decision, it is not an impossibility that the California court will elect to treat a private repossession differently than one involving state assistance. From the debtor's point of view it would seem to make little difference who is in fact taking the property from him. The question is "how" that property is being taken. Granted there is a constitutional difference in that the fourteenth amendment requires that there be state action. But it can be argued that that requirement is fulfilled by the enactment of a state law regulating the repossession procedure as well as physical participation by the state in the actual repossession. What is needed is a definitive statement of what constitutes state action. Such a statement was initiated in *Reitman* in regard to racial discrimination. It now remains for the California courts to determine whether such a definition should apply equally to other areas of the law. It seems insufficient to limit such a definition to physical participation by the state when the essence of the matter is actually the state's policy—be it active enforcement or statutory mandates. Indeed, if *Reitman* and *Randone* are to be given any credibility, the *Adams* decision must be affirmed.[241] The alternative is to limit *Reitman's* rationale to the facts of that case.

LEGISLATIVE DEVELOPMENTS IN CALIFORNIA

Ideally, legislation proposed to alleviate the constitutional shortcomings of those statutes recently found deficient should protect both the consumer and the creditor—the creditor from undue delays and depreciation in the value of his security, and the consumer from unfair seizures.

In order to comply with the guidelines expressed in *Randone, Blair, Goldberg*, and *Fuentes* while at the same time providing for legal seizures, prejudgment attachments and claim and delivery statutes should provide for such takings only in extraordinary situations.[242] Under any other situations the procedure must provide for both notice and hearing on the validity of the creditor's claim.[243]

Unfortunately, solutions have not been readily forthcoming from the state legislature. Indeed most proposals have failed to muster enough enthusiasm to get out of committee.[244]

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241. It may be interesting to note that the Supreme Court in *Fuentes* cited *Adams* as part of the trend to read *Sniadach* broadly. This may be significant in that the *Fuentes* court sanctioned such a broad interpretation. *See* Fuentes v. Shevin, 92 S. Ct. 1983 at n.5 (1972).

242. Ordin, *supra* note 47, at 234.

243. *Id.*

244. *E.g.,* A.B. 1225 (1970) authored by Yvonne Braithwaite subsequent to *Sniadach* and prior to *Blair* and *Randone*; and A.B. 2012 (1971) spon-

In its 1972 Session (which adjourned at the end of the summer), the California legislature wrestled with the statutory voids created by the current trend in court decisions. In the Assembly, three bills were introduced. One of those bills[245] attempted to constitutionally revive attachment by providing the possessor of property prior notice of an adverse party's claims and an opportunity to refute the claims by either affidavit or testimony at a judicial hearing. This bill was killed in committee.

A second bill[246] would have been applicable only to items defined as "necessities of life." It would have barred a creditor from personally repossessing property and would have required a law enforcement officer to make the actual repossession. This bill also did not survive committee. One might note that the bill depended upon the classification of "necessities of life"—a classification invalidated by the *Fuentes* decision shortly before the bill's defeat.

Two Assembly bills have been approved by the legislature and have been signed by the governor. California's Code of Civil Procedure § 509 *et seq.*[247] (claim and delivery statutes) have been revised to enable a person who wants to repossess property to obtain a court order directing a sheriff's officer to seize the property for him.[248]

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sored by Assemblyman Waxman subsequent to *Blair* and *Randone*, attempted to institute a constitutional extrajudicial repossession statute prior to any definitive court test of the validity of extrajudicial repossession.

245. A.B. 2294 (1972) introduced by Assemblyman John Stull.

246. A.B. 541 (1972) submitted by Assemblyman Waxman.

247. A.B. 1623 (1972) introduced by Assemblyman Charles Warren.

248. The new bill provides that where a delivery is claimed the plaintiff by complaint, affidavit, or declaration shall show; (1) that the plaintiff is the owner of the property claimed or is entitled to the possession of the property; (2) that the property is wrongfully detained by the defendant, the means by which the defendant came into possession of the property, and the cause of the detention; (3) a description of the property.

If the affidavit, complaint or declaration meets the above requirements to the court's satisfaction, an order to show cause will be directed at the defendant to demonstrate why the property should not be taken from him and given to the plaintiff. The order will fix the time and place for a hearing no sooner than 10 days from its issuance. The order will inform the defendant that he can file affidavits on his own behalf and present testimony at the hearing, or he might file with the court a written undertaking to stay delivery of the property.

The court may issue a writ of possession prior to a hearing if there appears probable cause that: (1) the defendant gained possession by theft; (2) the property is negotiable or is a credit card; (3) by reason of specific,

The measure takes effect under an "urgency" provision which allows the bill to go into effect immediately. The bill will become inoperative on January 1, 1975—at least temporarily filling the current statutory void until more permanent measures can be implemented.

The bill affects only judicial repossessions and leaves extrajudicial self help remedies unaffected. Thus a claimant can repossess collateral of a security agreement without the court's supervision.

Notice to the possessor that a hearing on possession is pending is given by means of personal service or as the court determines to be reasonably calculated to afford notice. The claimant may obtain the property without notice and hearing to the possessor where possession is by theft, where the property is negotiable, where the property will perish before a hearing can be set, or where there is danger of destruction, serious harm, concealment, removal from the state, or sale to a bona fide purchaser. Additionally, there must be a showing of the actual threat of one of the former.

At the hearing, evidence may consist of the complaint, affidavits,

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competent testimony within the personal knowledge of an affiant or witness, the property is perishable and will perish before any hearing can be had, or is in the immediate danger of destruction or harm, concealment, or the holder of the property threatens to sell it to a bona fide purchaser.

If a writ of possession is granted a plaintiff, the defendant may apply to the court for an order shortening the time on the hearing for the order to show cause, and the court may, upon such application, shorten the time and direct that the matter be heard on not less than 48 hours notice to the plaintiff.

Upon the order to show cause, the court shall consider the showing made by both parties and shall make a preliminary determination of which party, with reasonable probability is entitled to possession or use, pending final adjudication of the parties' claims.

A writ of possession shall not issue until the plaintiff has filed a written undertaking consisting of two or more sureties to the affect that they are bound to the defendant for double the value of the property.

The writ is then directed to the sheriff or marshall of the jurisdiction where the property is located. The officer then would take the property from the defendant and retain it in his custody either by removing the property to a safe place or installing a "keeper" at the expense of the plaintiff. The officer may demand that the property be delivered over to him by the defendant and may call the power of his county into play to get it. The statute authorizes the officer to cause the building housing the property to be "broken open."

It may be noted that the new law still allows the defendant to secure a return of the property by posting his own bond.

The stated purpose of the legislation in enacting this statute was to give persons claiming the right to property the legal remedies to so claim within the stated requirements of *Blair*.

testimony and other evidence. The hearing court, though, is not required to find probable cause that the state and creditor's interests in possession outweigh the possessor's right to be secure from unreasonable searches and seizures. It appears clear that at least for the time being, the California legislature is steering clear of fourth amendment entanglements.[249]

In addition to changes in the claim and delivery statutes, Section 537 *et seq.* of the California Code of Civil Procedure have been repealed, and a revised section has replaced it.[250] This new bill pertains to a plaintiff in an action against a defendant (a defendant who is a corporation, partnership, individual engaged in a trade or business, or a person not residing in California, or one who is evading a summons) for a liquidated sum of money based upon a loan, a negotiable instrument, services rendered or the sale or lease of real or personal property. The plaintiff in the prescribed action may attach all corporate or partnership property, and the inventory, accounts, contract rights, bank accounts, securities, equipment, and real estate of an individual engaged in trade or business. The new attachment provisions further provide for a hearing procedure in these cases of attachment.

Hopefully, these bills will prove beneficial until both the case trend and developments within the legislature itself take a turn toward even greater clarification of what type of legislation is feasible. If the *Adams* decision is upheld, it will entail even more legislative action than can be foreseen at this point.[251]

CONCLUSION

Although it is now clear that *Sniadach* has ushered into existence a period of change in the traditional notions of creditor prejudgment remedies, it would be unwise at this point in time to conclude that the summary remedy has breathed its last breath. Indeed, the only real tests of the doctrine thus far have come in the area of retail installment contracts. It yet remains to be seen whether the principles thus far considered will be successfully extended to the myriad of creditor remedies that remain.

249. *See* text accompanying n.84 *supra*.
250. Senate Bill 1048 (1972).
251. *See* discussion *supra* note 208.

Even at the time of this writing, one sacred bastion of the banking industry, the banker's lien, is being challenged under the *Sniadach* rationale.[252] And what of the Uniform Commercial Code provisions?[253] Unruh Act repossession provisions? Rees-Levering? Garagemen's liens? Paying taxes? or turning off one's electricity for lack of payment? Although the scope of this article has been the *Sniadach* trend in retail installment cases, it is imperative that one remember the true extent of the subject with which we are dealing. The success of the *Sniadach* rationale in installment contract cases does not guarantee a like success in other areas of the law—areas where the evils of adhesion contracts and unscrupulous sellers are not present, and where valid reasons may exist for the continuance of a summary procedure. Who could doubt the absurdity of granting hearings prior to the "taking" of taxes? Indeed, logic and experience may limit *Sniadach* and its progeny to the retail installment area.

At any rate, one thing is very clear: the questions surrounding the use of the summary creditor remedy will be with our courts and legislatures for some time to come.

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252. *See* Logullo v. Security Pacific National Bank, No. 72-4125 (S.D. Cal. Oct. 2, 1972).

253. There are UCC provisions aside from Sections 9-503 and 9-504 which could be challenged under the *Sniadach* trend's rationale. Specifically, *see* Sections 2-507(2) (effect of the seller's tender of goods); 2-702 (seller's remedies on discovery of a buyer's insolvency); 2-703(a) (seller's remedies in general) and 2-706 (seller's right to resell goods). Also note UCC Section 2-716 which specifically states that a buyer has a right of replevin on certain terms and conditions.